Supreme Court
FILED

99 554 SEP 29 1999

OFFICE OF THE CLERK

No. 99-

In the Supreme Court of the United States

GOODYEAR TIRE & RUBBER COMPANY AND
NATHANIEL WILLIE JEFFERSON BROCK,

Petitioners,

v.

TERESA VINSON,

Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of Alabama

PETITION FOR A WRIT OF CERTIORARI

LARRY W. HARPER
H.C. IRELAND, III
W. PERRY WEBB
Porterfield, Harper & Mills
22 Inverness Ctr. Pkwy.
Suite 600
Birmingham, AL 35253
(205) 980-5000

ANDREW L. FREY
Counsel of Record
MELANIE L. OXHORN
Mayer, Brown & Platt
1675 Broadway
New York, NY 10019
(212) 506-2500

Counsel for Petitioners

6477

QUESTION PRESENTED

Whether it was consistent with due process for the Alabama Supreme Court to refuse, on the basis of an unforeseeable procedural requirement announced for the first time in the appeal in this case, to consider petitioners' claim that a statutory cap on punitive damages should be applied to the judgment against them.

RULE 14.1(b) AND 29.6 STATEMENT

Pursuant to Rule 14.1(b), petitioners state that all parties to the proceeding are listed in the caption of the case.

Pursuant to Rule 29.6, petitioner Goodyear Tire & Rubber Co. states that it has no parent corporations. The publicly held companies that own 10% or more of petitioner's stock are Merrill Lynch & Co. and Stanford C. Bernstein & Co., Inc.

TABLE OF CONTENTS

Page

QUESTION PRESENTED I

RULE 14.1(b) AND 29.6 STATEMENT ii

TABLE OF AUTHORITIES v

OPINIONS BELOW 1

JURISDICTION 1

CONSTITUTIONAL PROVISIONS INVOLVED 1

INTRODUCTION 1

STATEMENT 3

1. The Underlying Events And Trial Proceedings In This Case 3

2. Petitioners' Reliance On The Statutory $250,000 Punitive Damages Cap In The Trial Court . . . 4

3. The Proceedings On Appeal To The Alabama Supreme Court 6

4. The Decision Of The Alabama Supreme Court 7

5. Petitioners' Unsuccessful Application For Rehearing 8

REASONS FOR GRANTING THE PETITION 10

A. THE DECISION BELOW VIOLATES THE DUE PROCESS CLAUSE BY CHANGING ALABAMA LAW TO ERECT A NEW AND UNFORESEEABLE BARRIER TO APPELLATE REVIEW ON A CLAIM THAT WAS ADEQUATELY PRESERVED UNDER THEN-EXISTING LAW 11

B. THE COURT SHOULD SUMMARILY REVERSE OR VACATE THE DECISION BELOW 19

CONCLUSION 21

TABLE OF AUTHORITIES

Page(s)

Cases:

Allison v. *United States*, 386 U.S. 13 (1967) 20

Brinkerhoff-Faris Trust Co. v. *Hill*, 281 U.S. 673 (1930) . . . . . *passim*

Cranman v. *Maxwell*, No. 2970444, 1998 WL 263525 (Ala. Civ. App. May 22, 1998) . 13

Cruz v. *Beto*, 405 U.S. 319 (1972) 19

Eaton v. *City of Tulsa*, 415 U.S. 697 (1974) 19

Ex parte Indus. Distrib. Servs. Warehouse, Inc., 709 So.2d 16 (Ala. 1997) 15

Ex parte State Dep't of Revenue, 595 So.2d 472 (Ala. 1991) 12

Flower v. *United States*, 407 U.S. 197 (1972) 19

Fugate v. *State Dep't of Indus. Relations*, 612 So.2d 1226 (Ala. Civ. App. 1992) 13

Goldman v. *Jameson*, 275 So.2d 108 (Ala. 1973) . . . 15

Henderson v. *Alabama Power Co.*, 627 So.2d 878 (Ala. 1993) . . . . . *passim*

In re Johnson, 282 So.2d 348 (Ala. 1973) 12

Joint Anti-Fascist Comm. v. *McGrath*, 341 U.S. 123 (1951) 20

Lassiter v. *Department of Soc. Servs.*, 452 U.S. 18 (1981) 19

Moradi-Shalal v. *Fireman's Fund Ins. Cos.*, 758 P.2d 58 (Cal. 1988) 15

TABLE OF AUTHORITIES — Continued

Page(s)

Mutual Assur., Inc. v. *Wilson*,
716 So.2d 1160 (Ala. 1998) 15

Oliver v. *Towns*, No. 1970312,
1999 WL 14675 (Ala. Jan. 15, 1999) 2

Owens v. *National Sec., Inc.*,
454 So.2d 1387 (Ala. 1984) 15

Palko v. *Connecticut*, 302 U.S. 319 (1937) 11

Pounders v. *Watson*, 521 U.S. 982 (1997) 19

Rankin v. *First Nat'l Bank*,
437 So.2d 503 (Ala. 1983) 12

Rayborn v. *Housing Auth.*,
164 So.2d 494 (Ala. 1964) 15

Reich v. *Collins*, 513 U.S. 106 (1994) 19

Richards v. *Henderson*, 589 So.2d 709 (Ala. 1991) . . 15

Rodriguez de Quijas v. *Shearson/American Express*,
490 U.S. 477 (1989) 13

Saunders v. *Shaw*, 244 U.S. 317 (1917) 18, 21

Southtrust Bank v. *Fairhope Single Tax Corp.*,
698 So.2d 777 (Ala. Civ. App. 1997) 13

Sperau v. *Ford Motor Co.*, 674 So.2d 24
(Ala. 1995) 5

Taylor v. *McKeithen*, 407 U.S. 191 (1972) 20

United States v. *Benmar Transp. & Leasing Co.*,
444 U.S. 4 (1979) 20

Wallace v. *Doege*, 484 So.2d 404 (Ala. 1986) 12

Wolff v. *McDonnell*, 418 U.S. 539 (1974) 19

Zinermon v. *Burch*, 494 U.S. 113 (1990) 19

Constitutional Provisions, Statutes and Rule:

U.S. Const. amend. XIV, § 1 . . . . . *passim*

28 U.S.C. § 1257(a) 1

49 C.F.R. § 391 *et seq.* 3

ALA. CODE § 6-11-21 . . . . . *passim*

ALA. CODE § 12-3-16 (1975) 13

ALA. R. PROF. CONDUCT 3.3 cmt. 14

Miscellaneous:

Morgan v. *Petro, Inc.*, Excerpt of
Aug. 2, 1999 Proceedings (CV-94-296)
(Al. Cir. Ct.) 9

PETITION FOR A WRIT OF CERTIORARI

Goodyear Tire & Rubber Company (Goodyear) and Nathaniel Willie Jefferson Brock respectfully petition for a writ of certiorari to review the judgment of the Supreme Court of Alabama in this case.

OPINIONS BELOW

The *per curiam* decision of the Supreme Court of Alabama and the special concurring opinions (App., *infra*, 1a-13a), together with the order and opinions accompanying the denial of rehearing (App., *infra*, 24a-35a), are reported at 1999 WL 236503 (Ala. April 23 and July 2, 1999). The order of the trial court (App., *infra*, 17a-23a) is unreported.

JURISDICTION

The decision of the Supreme Court of Alabama was rendered on April 23, 1999, and a timely petition for rehearing was denied on July 2, 1999. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISIONS INVOLVED

The Due Process Clause of the Fourteenth Amendment to the United States Constitution provides in relevant part: "nor shall any State deprive any person of life, liberty, or property, without due process of law." U.S. Const. amend. XIV, § 1.

INTRODUCTION

Petitioners come before this Court bearing the burden of a multimillion dollar punitive judgment against them. Were this judgment the result of fair and regular judicial processes, the case would present no basis for this Court's review. But the judgment is instead the result of an aberrational process of appellate review that on its face violates basic due process principles.

An Alabama statute caps punitive damages in cases like this at $250,000. In *Henderson* v. *Alabama Power Co.*, 627

So.2d 828 (Ala. 1993), the Alabama Supreme Court invalidated the statutory cap on state constitutional grounds. More recently, however, a majority of the justices of that court have indicated their disagreement with *Henderson* and their inclination to overrule it. See, *e.g.*, *Oliver* v. *Towns*, No. 1970312, 1999 WL 14675, *7 (Ala. Jan. 15, 1999) (Lyons, J., concurring in part and concurring in the result in part). In the instant case, which arose out of a highway accident, the jury returned a verdict awarding $6 million dollars in punitive damages against petitioners jointly, and petitioners contended that the punitive damages must be reduced to no more than $250,000.

Petitioners asserted this claim at various stages of the trial court proceedings; in their post-verdict motion for remittitur, petitioners reiterated the position and also invoked the cap as a benchmark for the remittitur analysis. They did not, however, expressly ask the trial court to overrule *Henderson* and directly apply the cap. Instead, acknowledging that the trial court lacked power to disregard *Henderson,* they expressly reserved the right to raise that issue before the supreme court.

On appeal, the Alabama Supreme Court refused to consider the cap issue because of petitioners' failure to ask the trial court to apply the cap notwithstanding *Henderson* — something that court plainly lacked the power to do. This unprecedented disposition deprived petitioners of their right of appeal on a basis that was unforeseeable under — indeed, contrary to — prior Alabama law. In so acting, the Alabama Supreme Court was guilty of a fundamental violation of established due process principles safeguarding litigants' right to a fair opportunity to defend the case against them. Intervention by this Court is called for, especially in light of the propensity of the Alabama Supreme Court to give short shrift to federal rights.

STATEMENT

1. ***The Underlying Events And Trial Proceedings In This Case.*** This case arose out of a 1994 automobile accident in Jefferson County, Alabama, involving respondent Teresa Vinson and petitioner Brock. At the time of the accident, Brock was driving a vehicle owned by Goodyear, which employed him as a tire changer. On March 2, 1995, respondent sued petitioners in the Circuit Court of Jefferson County, alleging that Brock, individually and as an employee of Goodyear, had negligently operated his vehicle in such a manner as to run her off the road and cause her injuries. (C. 2-4).[1] Respondent subsequently amended her complaint to allege that Brock's conduct had been not only negligent but wanton, and that Goodyear had itself acted negligently or wantonly by entrusting its vehicle to Brock when Goodyear knew or should have known that Brock was incompetent to operate the vehicle. (C. 49, 65).

At trial, respondent's safety expert testified that the accident probably resulted from Brock having fallen asleep at the wheel, causing a momentary lapse in attention and a loss of control over the vehicle. (R. 544-45). Goodyear presented undisputed evidence that its safety program for its drivers fully satisfied even the rigorous standards of the Federal Motor Carrier Safety Regulations, 49 C.F.R. § 391 *et seq*. Goodyear also proved that Brock, who used its vehicle only for the limited purpose of getting to and from work, had a driving record that complied with federal safety standards at the time of the accident, which were predicated on consideration of the most recent three years' driving history. Respondent's expert, on the other hand, expressed the view that the federal standards were too lax and that Goodyear should have considered the past five years of

---

[1] "C." refers to the clerk's record on appeal in the Alabama Supreme Court; "R." refers to the trial transcript.

Brock's driving record, which included two minor accidents and which, in the expert's view, showed a need for more safety training.

After a four-day trial, the jury returned a verdict in favor of respondent that awarded her not only $2 million in compensatory damages but $6 million in punitive damages. (C. 301, 302). Goodyear and Brock then renewed the motion for judgment as a matter of law that they had filed at the close of respondent's case, and also moved for a new trial or remittitur of the punitive damages. The remittitur motion relied, in part, on petitioners' claim that the $250,000 cap on punitive damages should be applied even though that cap had been struck down only a few years earlier by the Alabama Supreme Court as violative of the state constitution. (C. 396, 397). Following a "*Hammond/Green Oil* hearing" on the excessiveness of the punitive damages, the trial court, on July 10, 1998, denied petitioners' motions for JMOL and new trial but remitted the punitive damages to $2 million. After respondent accepted the remittitur (C. 445-46), petitioners appealed to the Alabama Supreme Court (C. 450-51).

2. ***Petitioners' Reliance On The Statutory $250,000 Punitive Damages Cap In The Trial Court.*** Petitioners' Amended Answers in this case included the following defenses:

> 14. This defendant specifically pleads the limitations set forth in § 6-11-21 of the Alabama Code.
>
> 15. This defendant pleads the $250,000.00 cap and avers that the abolishment of the cap by the Alabama Supreme Court was unconstitutional and without effect.
>
> 16. This defendant avers that the Alabama Supreme Court cannot abolish the $250,000.00 cap for punitive damages established by the legislature and the attempt to abolish the cap violates the Constitutions of the United States and the State of Alabama.

(C. 26, 27, 33, 34). Thus, even before trial, petitioners had alerted opposing counsel and the court of their intention to challenge the controlling *Henderson* decision and to assert the punitive cap as a defense to any large punitive award.

Petitioners renewed the point during the trial. In arguing their motions for JMOL at the close of respondent's case and again at the close of all the evidence, and also in arguing exceptions to the jury charge, petitioners relied upon all constitutional defenses raised in their Answers, expressly including defenses 14 through 16 concerning the claim for punitive damages. (R. 1177-79; 1346, 1347).

Following the jury's verdict awarding punitive damages against them, petitioners filed various motions, including a motion for remittitur that stated in relevant part that petitioners were "adopt[ing] and incorporat[ing] herein by reference all the grounds cited * * * for judgments as a matter of law during the trial, including the grounds submitted in writing and those made orally during argument before the Court." (C. 325-26).

In their brief in support of their post-trial motions, petitioners acknowledged — as they believed they were ethically required to do — that the trial court was "bound by *Henderson*," but they "reserve[d] the right * * * to ask the Alabama Supreme Court to overrule that decision and apply the statutory cap in this case." (C. 396 n.6). Petitioners further argued that, even though the cap had been struck down in *Henderson* as impairing the traditional function of the jury, "that d[id] not render irrelevant the legislature's determination that in this type of case, $250,000.00 [wa]s the maximum reasonable amount." They accordingly urged that the cap remained a useful guidepost for courts attempting to conduct meaningful review of jury verdicts awarding punitive damages. (C. 396-97, citing *Sperau* v. *Ford Motor Co.*, 674 So.2d 24, 44 (Ala. 1995) (Houston, J., dissenting)). As petitioners noted, the fact that the jury had in this case

awarded $6 million for conduct that the state legislature previously believed justified punishment in an amount no greater than $250,000 further evidenced that the jury's award was grossly excessive as a matter of public policy. (C. 397).

Accordingly, the application of the $250,000 cap and the continued vitality of *Henderson* were squarely presented to the trial court, even though petitioners did not in so many words ask the trial to court overturn the supreme court's decision. The trial court implicitly rejected petitioners' arguments when it remitted the punitive damages to $2 million rather than the $250,000 that petitioners had urged was the most that could properly be assessed. By this action, the trial court necessarily declined to give effect to Ala. Code § 6-11-21.

3. ***The Proceedings On Appeal To The Alabama Supreme Court.*** On appeal to the Alabama Supreme Court, petitioners' briefs discussed at length why the *Henderson* decision should be overruled and the $250,000 cap on punitive damages applied to the jury award in this case. In response to these arguments, respondent contended simply that *Henderson* was "the law" and that the cap should not be applied to the case. Notably, respondent never contended in her briefs or at any point prior to oral argument on the appeal that petitioners had in any respect failed to preserve for review the issue of whether *Henderson* should be overruled and the cap on punitive damages applied to the jury's award.

In light of the great significance of the issues being raised by petitioners in their briefs, the Alabama Supreme Court granted oral argument, which was held at a special session conducted at the University of Alabama School of Law on Friday, March 12, 1999. Shortly before the argument, the court issued a directive to the parties to be prepared to discuss the legal implications of overruling the *Henderson* decision. See App., *infra*, at 14a-16a.

A substantial portion of petitioners' oral presentation before the court was devoted to addressing both the arguments favoring overruling *Henderson* and the reasons for reinstating the cap in this case rather than merely prospectively. During this presentation, no issue of waiver was raised by the court. Indeed, it was only in the course of respondent's argument that her counsel first suggested that application of the punitive damages cap had not been asserted properly in the trial court. In response, counsel for petitioners called the Alabama Supreme Court's attention to the contents of their Amended Answers as well as the express reservation of the issue in the post-trial briefing. Moreover, immediately following oral argument, petitioners submitted a letter to the court detailing the various points during the trial court proceedings at which the applicability of the statutory punitive damages cap was asserted.

4. ***The Decision Of The Alabama Supreme Court.*** On April 23, 1999, the Alabama Supreme Court issued a *per curiam* decision denying petitioners any relief and summarily affirming the judgment below. The special concurrences of Chief Justice Hooper and Justices Houston, Maddox, See, and Lyons reflected that a majority of the members of the court would be open to revisiting and even overruling *Henderson*. However, as several of the special concurring opinions made clear, the court had refused to consider petitioners' challenge to *Henderson* on the ground that the claim had not been preserved for appeal because the record did not reflect "any adverse ruling by the trial court upon which this Court could predicate error." App., *infra*, at 3a (Houston, J., concurring specially) (observing, however, "that this was a very close question"); *id.* at 11a-12a (Lyons, J., concurring specially) (agreeing with "Justice Houston's preference for deferring the question of whether" *Henderson* should be overruled, and observing that "[w]hen we have before us a case in which the trial court has expressly ruled that the 'cap' statute * * * can or cannot be applied, and it is squarely presented to us on

appeal, then I believe that we should revisit *Henderson*"); *id.* at 13a (Brown, J., concurring specially) (agreeing "that this case presents a close question" as to whether the cap issue "was properly preserved for review," and also contending that "[t]his Court should not revisit [*Henderson*] unless it is convinced that the appellant properly preserved that issue by obtaining an adverse ruling from the trial court").

5. ***Petitioners' Unsuccessful Request For Rehearing.*** In a timely application for rehearing, petitioners addressed the unexpected and unfair consequences of the Alabama Supreme Court's disposition of the cap issue. Petitioners emphasized that prior to the decision in this case, there was not the slightest suggestion in Alabama statutes, rules, or judicial decisions that a party needed to do more than petitioners did here — seek relief in the answer; raise the point again at the directed verdict and jury instruction stages; seek such relief in post-trial motions; state in express and unequivocal terms the desire to preserve the issue for review by the state supreme court; and omitting only the futile act of asking the trial court to overrule or disregard controlling precedent from the state supreme court — to preserve their right to ask the supreme court to reexamine one of its precedents.

In seeking reconsideration, petitioners specifically asserted the claim that the state supreme court's action had deprived them of their constitutional right to due process of law. They cited, *inter alia*, *Brinkerhoff-Faris Trust Co.* v. *Hill*, 281 U.S. 673 (1930), in which this Court held that an arbitrary departure from established procedures or retroactive application of a new procedural requirement violates the Due Process Clause when it deprives a party of its right to appellate review.

On July 2, 1999, the Alabama Supreme Court denied reconsideration without comment. In separate concurring opinions, Justices Lyons and Johnstone reasoned that the failure to ask the trial court to overrule *Henderson* or at least

grant an interlocutory appeal to the supreme court on that issue meant that there was no trial court "error" for the supreme court to review and reverse. See App., *infra*, at 25a (Lyons, J., concurring) (arguing, in circular fashion, that "requiring a party to make a record in the trial court [*i.e.*, seek a ruling], even in the face of settled precedent, forces a party to seek a timely ruling so as to avoid a waiver"; that "[r]equiring timely action thereby assists the appellate court in identifying the appropriate stage for applying the new rule in further proceedings after remand"; and that "it is anomalous to reverse a trial court's order on a ground the trial court was never asked to consider"); *id.* at 30a (Johnstone, J., concurring) ("[t]his Court cannot hold the trial court in error absent an adverse ruling constituting error").[2]

However, two members of the court who had previously found a waiver expressed their disagreement with the majority's treatment of petitioners' claim. In a thorough

---

[2] In a subsequent, unrelated case before Judge King, the trial judge in this case, counsel who had represented Goodyear and Brock at trial expressly asked, consistently with the ruling of the Alabama Supreme Court here, for the overruling of *Henderson*. After noting that he lacked the power to change the law but assuring counsel that he had "raised" the statutory cap issue and that no one would "be able to come back and say you didn't raise it," Judge King observed on the record: "***You raised it before [in Vinson* v. *Goodyear]. I told them [i.e., the Alabama Supreme Court] you raised it before, but it did no good.***" *Morgan* v. *Petro, Inc.*, Excerpt of Aug. 2, 1999, Proceedings at 17 (CV-94-296) (emphasis added). In other words, the trial court in this case had not only recognized that petitioners had raised the cap issue before it but apparently had actually advised the Alabama Supreme Court, ***prior*** to their finding of waiver, that he was satisfied that the issue was properly presented and preserved for purposes of appeal. The Alabama Supreme Court's disposition of this case thus required it to ignore the trial court's own view that the issue was before him.

dissenting opinion joined by Justice Maddox, Justice Houston agreed with petitioners' contention that the court's refusal to reach the cap issue had deprived petitioners of due process because petitioners could not reasonably have anticipated that they would be required to first seek a ruling from the trial court regarding *Henderson*. As the dissenters observed, the supreme court previously had been consistent in rejecting any requirement that litigants were required to engage in a "pointless ceremony" in order to obtain appellate review; thus, the court was unfairly "surpris[ing]" petitioners by now requiring them to have "asked the trial judge to do something that he did not have, and never would have, the power to do: overrule * * * a decision of this Court." App., *infra*, at 30a.

REASONS FOR GRANTING THE PETITION

This case presents an extreme example of an aberrant process of appellate review that has squarely violated fundamental tenets of the Due Process Clause. At stake is a multi-million dollar punitive award against petitioners for conduct that, they continue to maintain, was negligent at worst. Their appeal to the Alabama Supreme Court presented the highly promising legal claim that that court's prior decision in *Henderson* should be overruled and the statutory $250,000 punitive cap applied in this case — a contention sufficiently important and substantial to cause the supreme court to grant petitioners' request for oral argument, which is afforded in only a small percentage of appeals in that court.

Having done so, however, the Alabama Supreme Court then inexplicably chose to depart from established procedures and conclude that because petitioners did not ask the trial court to overrule *Henderson* in their post-trial papers (even though they expressly stated their intention to preserve that claim and even though the trial court was without power to grant the relief in question) and because the trial court's post-trial order did not explicitly address the continued vitality of *Henderson* (even though the order disposed of petitioners'

post-trial motions in a way that was inconsistent with the cap), no reviewable ruling existed on that issue.

That unexpected and unwarranted disposition cut off any review of petitioners' legal claim, which only the Alabama Supreme Court could entertain. It did so despite the fact that a right of appeal to the supreme court is generally available in cases like this one and despite the fact, as shown below, that under then-existing law petitioners properly presented the claim and could not have known that they were waiving their right to its consideration. The upshot is that petitioners stand in peril of having to pay the $2 million punishment (with associated interest) even though a majority of the members of the Alabama Supreme Court indicated that they would have been willing to revisit *Henderson* and possibly apply the punitive cap in this case.

This result plainly violates the most fundamental dictate of due process: the right to be heard, which "must be a real one, not a sham or a pretense." *Palko* v. *Connecticut*, 302 U.S. 319, 327 (1937). The cavalier manner in which the Alabama Supreme Court disregarded petitioners' federal due process rights cries out for correction. The decision below should be summarily reversed or vacated, and the case remanded to allow resolution of petitioners' substantial legal claim that was unfairly held to be forfeited.

A. THE DECISION BELOW VIOLATES THE DUE PROCESS CLAUSE BY CHANGING ALABAMA LAW TO ERECT A NEW AND UNFORESEEABLE BARRIER TO APPELLATE REVIEW OF A CLAIM THAT WAS ADEQUATELY PRESERVED UNDER THEN-EXISTING LAW

The procedures followed by petitioners to preserve and present their claim for application of Alabama's statutory cap on punitive damages were consistent with Alabama law as it stood at the time they acted, and the deprivation of their right of appeal to the only forum that had the power to grant the

relief in question constituted a stark violation of the Due Process Clause.

1. At the time of the proceedings in this case, it was established law in Alabama that once an issue had been brought to the attention of the trial court in pleadings, that issue was preserved for appeal, even if the trial court had never expressly ruled on that issue or had specifically declined to do so. The rationale for this was that once an issue had been raised in a party's pleadings and argued, no unfairness would result from allowing that party to pursue the issue on appeal. See, *e.g.*, *Rankin* v. *First Nat'l Bank*, 437 So.2d 503 (Ala. 1983).

Moreover, there was no requirement that an adverse ruling actually be obtained; that was seen as a matter beyond the control of a litigant and theretofore was not supposed to be prerequisite to an appeal. See, *e.g.*, *Wallace* v. *Doege*, 484 So.2d 404, 405 (Ala. 1986) ("[T]he statute of limitations was raised as an affirmative defense in the pleadings and was presented to the trial court at the close of all the evidence, but the trial court refused to hear it at that time. Since the statute of limitations was put into issue in the pleadings, it may be considered on appeal."); *Ex parte State Dep't of Revenue*, 595 So.2d 472, 474 (Ala. 1991) (stating that "[b]ased on our review of the record, we find that the constitutionality of § 6-5-605 was at issue below, although the trial court declined to address it"); *In re Johnson*, 282 So.2d 348, 348 (Ala. 1973) (Heflin, C.J., dissenting) (noting that although trial court's decision did not mention defendant's constitutional defenses, "[a]n inspection of the briefs filed in the [lower court] reveals that such issues were raised and argued to that court both on original submission and on rehearing").

Moreover, requiring a party to insist upon and obtain an express "adverse ruling" from the trial court with respect to the applicability of binding precedent makes no sense. In Alabama's judicial system, as generally in the Anglo-

American legal system, an inferior court may not refuse to apply a controlling decision of the supreme court, which alone possesses the power to overrule or modify its precedents. That is true even if the supreme court or individual members have expressed a belief that an earlier decision was in error or is no longer viable. See *Cranman* v. *Maxwell*, No. 2970444, 1998 WL 263525, *5 (Ala. Civ. App. May 22, 1998) ("Assuming, without deciding, that *Smith I*, *Smith II* and *Harper* * * * may have been wrongly decided, we are bound by those decisions of our Supreme Court. We are not at liberty to depart from the decisions of our Supreme Court * * * ."); *Southtrust Bank* v. *Fairhope Single Tax Corp.*, 698 So.2d 777, 779 (Ala. Civ. App. 1997) ("The circuit court, as well as this court, is bound by the decisions of our Supreme Court.") (citing ALA. CODE § 12-3-16 (1975)). Cf. *Rodriguez de Quijas* v. *Shearson/American Express*, 490 U.S. 477, 484 (1989) (court of appeals should follow directly controlling precedent, even if the precedent appears to rest on reasoning rejected in subsequent Supreme Court cases, leaving to the Supreme Court the prerogative of overruling its own decisions). It was clear, then, that the trial court here was obligated by its place in the Alabama judicial hierarchy to apply the decision in *Henderson* and that it was without discretion or authority to do otherwise.

In view of this, under the then existing Alabama law, the only "adverse ruling" that petitioners were required to obtain from the trial court with respect to the punitive cap issue was a ruling that either expressly or implicitly followed or was consistent with *Henderson* and that was inconsistent with application of the cap. See, *e.g.*, *Fugate* v. *State Dep't of Indus. Relations*, 612 So.2d 1226, 1229-30 (Ala. Civ. App. 1992) (refusing to overrule supreme court precedent and upholding trial court's decision to deny appellant's request for jury trial, which was consistent with that precedent). That was precisely the sort of ruling made by the trial court here. Petitioners had sought a ruling from the trial court — a

reduction of the punitive award pursuant to the cap — that they acknowledged, as was their ethical duty (see ALA. R. PROF. CONDUCT 3.3 cmt.), was inconsistent with the controlling precedent of *Henderson*. Petitioners apprised opposing counsel and the trial court throughout the proceedings that they would, if the issue remained live, be seeking to have *Henderson* overruled by the only court with authority to do so, the Alabama Supreme Court.

When the trial court denied the requested relief, as it was bound to do, and upheld an award eight times the maximum amount allowable under the cap, petitioners reasonably expected that an adequate record existed for purposes of obtaining review of the cap issue by the state supreme court. Under any fair construction, the trial court ***had*** decided the issue of whether the statutory punitive cap, which *Henderson* had previously declared unconstitutional, should be applied in this case, because the trial court permitted a punitive award to stand that far exceeded what the cap allowed.

In sum, then, in Alabama an issue that was specifically identified by the appellant in the trial court was ordinarily ripe for appeal, especially where the trial court lacked power to take favorable action on the issue. Even in hindsight, there plainly was nothing meaningful that petitioners omitted to do in the trial court that would better have presented the state supreme court with the issue of reinstating the punitive damage cap of Ala. Code § 6-11-21.[3] Equally important,

---

[3] Requiring a party to explicitly ask a trial court to overrule a binding precedent where the court lacks authority to do so, or to secure a ruling from the trial court specifically acknowledging the court's lack of authority to overrule that precedent, would of course be pointless. The purpose of preservation requirements is to ensure that all parties and the court are given notice of and an opportunity to address the claim or correct the error that is ultimately the basis for an appeal. In view of this, the Supreme Court of California

(continued...)

nothing in prior Alabama precedents gave the slightest indication that anything more — such as making the ethically dubious and manifestly useless gesture of asking the trial court in the post-trial briefing to actually apply the cap — was required.

In fact, the Alabama Supreme Court's ultimate holding in this case that such a futile and overly technical step had to be taken squarely contradicted that court's oft-repeated statement that "Alabama law does not require the performance of a vain or useless act." *Mutual Assur., Inc.* v. *Wilson*, 716 So.2d 1160, 1165 (Ala. 1998). See also, *e.g.*, *Ex parte Indus. Distrib. Servs. Warehouse, Inc.*, 709 So.2d 16 (Ala. 1997); *Richards* v. *Henderson*, 589 So.2d 709 (Ala. 1991); *Owens* v. *National Sec., Inc.*, 454 So.2d 1387 (Ala. 1984); *Goldman* v. *Jameson*, 275 So.2d 108 (Ala. 1973); *Rayborn* v. *Housing Auth.*, 164 So.2d 494 (Ala. 1964).

2. The effect of the proceedings below has been unfairly and arbitrarily to cut off petitioners' appeal on their challenge to a controlling but dubious precedent. Under this Court's settled precedents, such a result violates the Due Process Clause.

In *Brinkerhoff-Faris Trust Co.* v. *Hill*, 281 U.S. 673 (1930), the Missouri Supreme Court denied relief to a taxpayer corporation on the ground that it had failed to pursue

---

[3] (...continued)
ruled explicitly that a party need not ask the trial court to overrule a binding precedent in order to appeal from a ruling that follows that precedent. See *Moradi-Shalal* v. *Fireman's Fund Ins. Cos.*, 758 P.2d 58, 60 (Cal. 1988) ("The dissent herein, observing that defendant did not raise the issue in the lower courts, suggests that we have improperly sought out an opportunity to overrule one of our decisions. [However, t]he original petition for review squarely raised the point, and we never narrowed the issues to exclude it. * * * Accordingly, the *Royal Globe* issue is properly before us.").

an administrative remedy before the State Tax Commission. In reaching that result, the court overruled a consistent line of its own prior decisions that had held it unnecessary to pursue the same remedy. At the time of the court's ruling, it was too late for the taxpayer to pursue the required remedy in the case at hand. On petition for rehearing, the taxpayer contended that this unexpected disposition had deprived it of due process of law, a claim that the Missouri Supreme Court rejected without comment. See *id.* at 674-78.

This Court granted certiorari and reversed, holding that the proceedings below had deprived the taxpayer of "due process of law" – using that term in its "primary sense" of an "opportunity to be heard and to defend its substantive right." 281 U.S. at 678. The Court stated, first, that "the practical effect of the judgment of the Missouri court is to deprive the plaintiff of property without affording it at any time an opportunity to be heard in its defense." *Id.* It also noted that no fault could be charged to the petitioning taxpayer, which "did not omit to comply with any existing condition precedent." *Id.* at 679.

The same is true in this case: petitioners complied with every existing condition precedent for preservation of a claim that the trial court lacked the authority to uphold, yet the Alabama Supreme Court disposed of petitioners' challenge to *Henderson* on an unprecedented waiver theory without considering it on the merits (even though a majority of the court's members stated in concurring opinions that they would have revisited it and even overruled *Henderson* had the issue been reached). As in *Brinkerhoff-Faris*, the practical effect of the Alabama Supreme Court's decision is to deprive petitioners of property "without affording [them] at any time an opportunity to be heard" on the merits of that question of law that petitioners had properly identified and unequivocally asserted in the trial court and properly raised on appeal. *Id.* at 678.

As noted, the *Brinkerhoff-Faris* opinion went on to conclude that the unusual proceedings in that case did not afford the taxpayer with due process "in its primary sense" of "an opportunity to present its case and to be heard in its support." 281 U.S. at 681. As the Court explained (*id.* at 679):

> If the judgment is permitted to stand, deprivation of [petitioner's] property is accomplished without its ever having had an opportunity to defend against the exaction. The state court refused to hear [petitioner's] complaint and denied it relief, not because of lack of power or because of any demerit in the [claim], but because, assuming power and merit, the plaintiff did not first seek an administrative remedy which, in fact, was never available and which is not now open to it.

Here, too, there is no satisfactory explanation for the Alabama Supreme Court's unexpected disposition of the case; petitioners' rights to an appeal on the issue of the cap (as well as other potentially dispositive questions of law) has been cut off "not because of lack of power or because of any demerit in the" claims, but because of an arbitrary departure from established procedures. Had petitioners anticipated that the Alabama Supreme Court might impose such an unprecedented preservation requirement, they would obviously have gone through the pointless ritual of asking the trial court to overturn *Henderson* or, at least, to explicitly state that it was declining to usurp its judicial role by doing so. It is undeniable that petitioners made unequivocally and repeatedly clear to the trial court that they claimed the benefit of the statutory cap, refraining only from demanding that the trial court do what it could not (*i.e.*, refuse to follow *Henderson*), and that nothing in then-existing Alabama law required them to do more. The proceedings here have thus violated the Due Process Clause "in its primary sense," under this Court's holding in *Brinkerhoff-Faris*. *Id.* at 681.

Similarly, in *Saunders* v. *Shaw*, 244 U.S. 317 (1917), the state trial court excluded certain proof on a particular issue of fact because it considered the fact to be immaterial to the proper outcome of the case. The Louisiana Supreme Court took a different view of the matter, concluding that the issue was dispositive; it thereupon reversed the trial court's judgment on the basis of the evidence that had been included in the record on that issue, but without any consideration of the excluded evidence. The intervenor defendant appealed to this Court, contending that the this ruling had deprived him of due process of law "because the case ha[d] been decided against him without his ever having had the proper opportunity to present his evidence" on the factual issue found to be dispositive by the Louisiana Supreme Court. *Id.* at 319. Although this Court expressed some doubt that any further factfinding on the issue would actually change the result of the case, it reversed because "we do not see in the record an absolute warrant for the assumption, and therefore cannot be sure that the defendant's rights are protected without giving him a chance to put his evidence in." *Id.*

Saunders is the precise analogue, with respect to questions of fact, to the due process issues raised by this petition with respect to questions of law. The complaining party in *Saunders* had been prevented by a peculiar conjunction of legal rulings from presenting his factual case on a dispositive issue and having it considered and determined on the merits by the state courts. In exactly the same fashion, the unusual proceedings in this case have unjustly denied petitioners any determination of their challenge to *Henderson*. Here, as in *Saunders*, petitioners are entitled to be afforded the "chance" (*Saunders*, 244 U.S. at 319) to receive the appellate review that is guaranteed as a matter of right to every party under Alabama law. And, unlike in *Saunders*, here there is every reason to anticipate that such review would actually change the result in this case by leading the Alabama Supreme Court to overrule its prior

decision, reinstate the cap, and order a substantial reduction of the punitive award.

The constitutional violation in this case is a pointed example of the larger affront to the constitutionally required fair procedure that results whenever the government, including the judiciary, acts arbitrarily or departs arbitrarily from established procedures. See, *e.g.*, *Zinermon* v. *Burch*, 494 U.S. 113, 125 (1990); *Wolff* v. *McDonnell*, 418 U.S. 539, 558 (1974); see also *Brinkerhoff-Faris*, 281 U.S. at 680 ("The federal guaranty of due process extends to state action through its judicial as well as its legislative, executive or administrative branch of government."). As this Court remarked recently in *Reich* v. *Collins*, 513 U.S. 106, 111 (1994), under the Due Process Clause "a State may not * * * reconfigure its scheme, unfairly, in mid-course."

In sum, the decision of the court below — by departing arbitrarily in "mid-course" from settled procedures on which petitioners relied and thus depriving petitioners of their right to have a substantial legal claim considered and decided on its merits – threatens the most basic guarantee of the Due Process Clause: "fundamental fairness." *Lassiter* v. *Department of Soc. Servs.*, 452 U.S. 18, 24 (1981).

B. THE COURT SHOULD SUMMARILY REVERSE OR VACATE THE DECISION BELOW

This Court has granted summary reversal or vacatur in many cases in which it was palpably clear that constitutional violations had occurred. See, *e.g.*, *Pounders* v. *Watson*, 521 U.S. 982 (1997) (procedural due process); *Eaton* v. *City of Tulsa*, 415 U.S. 697 (1974) (freedom of speech); *Flower* v. *United States*, 407 U.S. 197 (1972) (freedom of speech); *Cruz* v. *Beto*, 405 U.S. 319 (1972) (freedom of religion). In this case, it is beyond dispute that petitioners raised a substantial legal claim in accordance with applicable state procedures yet were denied otherwise available appellate review on the basis of retroactive application of a new and

unforeseeable requirement for preservation of appellate rights. This course of action was especially prejudicial because the appellate court was the only one with power to protect petitioners from an unlawful deprivation of their property. This was a palpable violation of petitioners' due process right to a fair opportunity to defend themselves.

Petitioners accordingly request that the Court summarily reverse or vacate the judgment below, and remand this case to the Alabama Supreme Court with instructions to consider and resolve petitioners' substantial legal challenge to the *Henderson* decision, which was never addressed despite its merit. The Court has granted such orders and allowed remands in previous cases where it appeared that patently erroneous procedural obstacles may have been imposed that would violate due process. See, *e.g.*, *United States* v. *Benmar Transp. & Leasing Co.*, 444 U.S. 4 (1979) (summary reversal and remand in ICC case on basis of straightforward procedural error committed by court below); *Taylor* v. *McKeithen*, 407 U.S. 191 (1972) (summary vacatur and remand in reapportionment case where decision below lacked any explication of the reasons for its holding); *Allison* v. *United States*, 386 U.S. 13 (1967) (summary vacatur and remand where decision and record below created uncertainty about whether petitioner's right to counsel had been violated).

This case cries out for the same relief, given (a) the clear and indefensible violation of the Due Process Clause, (b) the history of disregard for federal rights exhibited by the Alabama Supreme Court, especially in punitive damages cases, (c) the substantial magnitude of the property interest at stake (a multi-million dollar punishment), (d) the strong possibility that the outcome below would be altered if the Alabama Supreme Court actually considered petitioners' challenge to *Henderson*, and (e) the truly minimal burden on this Court of ensuring compliance with "the deep-rooted demands of fair play enshrined in the Constitution." *Joint Anti-Fascist Comm.* v. *McGrath*, 341 U.S. 123, 161 (1951).

See also *Saunders*, 244 U.S. at 319 (Court remanded for further proceedings because it "cannot be sure that the defendant's rights are protected without giving him a chance" to present his claims properly for resolution on the merits).

CONCLUSION

The petition for a writ of certiorari should be granted. The judgment of the Alabama Supreme Court should be vacated, and the case should be remanded for that court to consider and determine petitioners' substantial legal claim that they are entitled to the benefit of Alabama's statutory cap on punitive damages.

Respectfully submitted.

LARRY W. HARPER
H.C. IRELAND, III
W. PERRY WEBB
Porterfield, Harper & Mills
22 Inverness Ctr. Pkwy.
Suite 600
Birmingham, AL 35253
(205) 980-5000

ANDREW L. FREY
Counsel of Record
MELANIE L. OXHORN
Mayer, Brown & Platt
1675 Broadway
New York, NY 10019
(212) 506-2500

Counsel for Petitioners

SEPTEMBER 1999

APPENDICES

APPENDIX A

SUPREME COURT OF ALABAMA

OCTOBER TERM, 1998-99

1972057

GOODYEAR TIRE AND RUBBER COMPANY
AND NATHANIEL WILLIE JEFFERSON BROCK

v.

TERESA M. VINSON

1972186

TERESA M. VINSON

v.

GOODYEAR TIRE AND RUBBER COMPANY
AND NATHANIEL WILLIE JEFFERSON BROCK

APPEALS FROM JEFFERSON CIRCUIT COURT
(CV-95-157)

APRIL 23, 1999

PER CURIAM.

AFFIRMED. NO OPINION.

See Rule 53(a)(1) and (a) (2) (F), Ala.R.App.P.

HOOPER, Chief Justice (concurring specially).

As Chief Justice, I intend to remain sensitive to the goal of preserving a consistent administration of justice in the State of Alabama. I think this Court should revisit *Henderson v. Alabama Power Co.*, 627 So.2d 878 (Ala. 1993). See my special writing in *Smith v. Schulte*, 671 So.2d 1334 (Ala. 1995) (Hooper, C.J., dissenting from the overruling of the application for rehearing). All parties litigating in the courts of the State should now be on notice that this Court is willing to reconsider the *Henderson* ruling that the punitive damages cap of § 6-11-21, Ala. Code 1975, is unconstitutional.

HOUSTON, JUSTICE (concurring specially).

I concur in the summary affirmance; however, I write separately to once again express my views on *Henderson v. Alabama Power Co.*, 627 So.2d 878 (Ala. 1993).

On June 25, 1993, this Court, by a 5 to 3 vote, declared Ala. Code 1975, § 6-11-21, limiting an award of punitive damages to $250,000, unconstitutional as violating Article I, § 11, of the Constitution of Alabama of 1901, which guarantees the right to trial by jury. *Henderson*. The correctness of this Court's decision in *Henderson* was challenged in dissents to *Henderson* when it was released. Although the majority opinion in *Henderson* has been the opinion of this Court for almost six years, the holding in *Henderson* and the selective application of its interpretation of the words "the right to trial by jury shall remain inviolate" have been criticized from the day that case was released and as recently as January 1999. See *Henderson*, 627 So.2d at 894-915 (Maddox, Houston, and Steagall, JJ., dissenting); *Ex parte Giles*, 632 So.2d 577 (Ala. 1993) (Maddox, J., concurring specially, at 586-87; Houston, J., concurring in the result, at 587-89); *Bozeman v. Busby*, 639 So.2d 501 (Ala. 1994) (Maddox J., dissenting, at 503; Houston, J., dissenting, at 503-04); *Complete Health, Inc. v. White*, 638 So.2d 784 (Ala. 1994) (Houston, J., dissenting, at 790); *Smith v. Schulte*, 671 So.2d 1334 (Ala. 1995) (Maddox, J., dissenting, at 1347-48; Houston, J., dissenting, at 1348-54; on application for rehearing, Hooper, C.J., dissenting, at 1355-61; Maddox, J., dissenting, at 1361-66; and Houston, J., dissenting at 1366-68); *Ex parte Jackson*, 672 So.2d 810 (Ala. 1995) (Houston, J., concurring in the result, at 811-13); *Ray v.*

Anesthesia Assocs. of Mobile, P.C., 674 So.2d 525 (Ala. 1995) (Maddox, J., dissenting, at 527-30; Houston, J., dissenting, at 530); *Loyal American Life Ins. Co. v. Mattiace*, 679 So.2d 229 (Ala. 1995) (Maddox, J., dissenting, at 245-47); *Ex parte Scott*, [Ms. 1961460, March 20, 1998] ___ So.2d __ (Ala. 1998) (Houston, J., concurring specially); *Oliver v. Towns*, [Ms. 1970312, January 15, 1999] ___ So.2d ____, _____ n. 7 (Ala. 1999) (*Henderson* questioned by a majority of the Court).

Henderson, in effect, overruled 83 years of precedent holding that "the State [has] the right to remit punitory damages." *Meighan v. Birmingham Terminal Co.*, 165 Ala. 591, 599, 51 So. 775, 778 (1910). The facts in *Meighan* showed that between the infliction of the injury and the time of the trial, the Legislature enacted an act that relieved the defendant of liability for damages that might have been assessed for the purpose of punishment. This Court held:

> "Exemplary damages are in no case a right of the plaintiff .... The state had the right to remit punitory damages, and by implication did so when it passed the act of ratification."

165 Ala. at 599, 51 So. at 777-78.

The defendants have asked this Court to overrule *Henderson*. I think this Court should revisit its decision in *Henderson*; however, I think it should do so only in a case in which the issue of the constitutionality of § 6-11-21 has been properly preserved for review. I thought initially that this was such a case, but, although I carefully examined the record, I was unable to find any adverse ruling by the trial court upon which this Court could predicate error. I must emphasize, though, that this was a very close question, at least from my perspective. However, given my unrelenting criticism of *Henderson* since the day it was released, I feel that I must exercise extreme caution in choosing the case in which to revisit it. I will not sacrifice other standards of appellate review at the alter of expediency, just so that I can reconsider an issue that, I believe, has been wrongly decided. This Court strives first and foremost to be an "error corrector," not an "error maker." However, when this Court does revisit *Henderson* in a future case where the issue of the constitutionality of § 6-11-21 is squarely presented, the following well-established principles of law will control my decision.

The right to trial by jury guaranteed by § 11 of the Alabama Constitution is confined to those classes of cases in which the right existed at common law or by statutory law at the time of the adoption of the Constitution of 1901. *Gilbreath v. Wallace*, 292 Ala. 267, 270, 292 So.2d 651, 653 (1974) (all Justices concurring); *Miller v. Gaston*, 212 Ala. 519, 103 So. 541 (1925); *In re One Chevrolet Auto.*, 205 Ala. 337, 87 So. 592 (1921); *Alford v. State ex rel. Attorney General*, 170 Ala. 178, 54 So. 213 (1910). The concept of the constitutional right to trial by jury, extending to those cases in which that right existed by statutory law at the time of the adoption of the most recent Constitution, predated the Constitution of 1901. See *Tims v. State*, 26 Ala. 165 (1855). This is consistent with the way in which the common law grew in this country. See *Manoukian v. Tomasian*, 237 F.2d 211, 215 (D.C. Cir. 1956).[1/]

What clear and paramount right did Article I, § 11, of the Constitution of 1901, guarantee to the citizens of this state? Section 11 explicitly states "[t]hat the right of trial by jury shall remain inviolate." This Court, interpreting these words, has consistently held that the ratification of § 11 effected a "freezing" of the right of trial by jury as that right existed at common law or by statute in 1901. Stated differently, § 11 did not enlarge the right of trial by jury that existed in any individual when the Constitution was ratified. *Gilbreath v. Wallace*, *supra*.

What exactly, then, were an individual's rights to a trial by jury before the ratification of the 1901 Constitution? This Court and the Courts of Appeals of this state have held that an individual, before the Constitution was ratified, had the right, in certain cases, to have a 12-person, impartial jury unanimously decide the facts. See *Clark v. Container Corp. of America, Inc.*, 589 So.2d 184 (Ala. 1991), citing

---

[1/] "British statutes antedating the Declaration of Independence have almost universally been regarded as having the effect of judicial precedent, rather than legislative enactment. 'The common law of the mother country as modified by positive enactments, together with the statute laws which are in force at the time of the emigration of the colonists, becomes in fact the common law rather than the common and statute law of the colony.'"

Gilbreath v. Wallace, supra; Kirk v. State, 247 Ala. 43, 22 So.2d 431 (1945); *Baadar v. State*, 201 Ala. 76, 77 So. 370 (1917); *Alford v. State ex rel. Attorney General, supra*; *Tims v. State, supra*; *Culbert v. State*, 52 Ala. App. 167, 290 So.2d 235 (1974); *Brown v. State*, 45 Ala. App. 391, 231 So.2d 167 (1970); *Dixon v. State*, 27 Ala. App. 64, 167 So. 340 (1936), cert. denied, 232 Ala. 150, 167 So. 349 (1936); Walter B. Jones, *Trial by Jury in Alabama*, 8 Ala. L. Rev. 274, 277 (1956); 16 Ruling Case Law 181 (1917). Of specific importance to this case is the fact that at common law juries were allowed, in proper cases, to assess punitive damages, L. Schleuter and K. Redden, *Punitive Damages*, § 1.3, at 12 (2d ed. 1989); and, indeed, punitive damages were awarded to injured parties who sued. See, e.g., *Rhodes v. Roberts*, 1 Stew. 145, 146-47 (Ala. 1827), where this Court, in affirming a $1,500 judgment against the defendant under a trespass theory, held:

> "Where the injury is to the person of the plaintiff, the amount of damages cannot be measured by any certain and precise standard. *The negligence may be very gross and reprehensible, and in all such cases the jury may give smart money, if in their view the circumstances are such as to require it.*"

(Emphasis added.) However, as *Rhodes* illustrates, even though at common law juries were allowed to assess punitive damages, and even though punitive damages were awarded to injured parties who sued, punitive damages at common law were awarded for the sole purpose of vindicating and protecting society's right (i.e., the right of the public) to be free from certain kinds of egregious tortious conduct, not for the purpose of providing a private compensatory remedy. See, e.g., *Meighan v. Birmingham Terminal Co., supra*, 165 Ala. at 598-99, 51 So. at 777-78, wherein this Court stated:

> "If conceivably a verdict for punitory damages might have been based upon these facts, we think the passage of the act of March 6, 1907, before the time of the trial, though subsequent to the infliction of the injury, ... had the effect to relieve defendant of liability for damages which it is assumed might otherwise have been assessed for the purpose of punishment. *Such damages are assessed in proper cases in the interest of the state. They are awarded not for the*

> *compensation of the plaintiff, but as a warning to other wrongdoers. A plaintiff has no right to maintain an action merely to inflict punishment. Exemplary damages are in no case a right of the plaintiff, but are assessed at the discretion of the jury for the purpose indicated .... The state had the right to remit punitory damages*, and by implication did so when it passed the act of ratification. That act could not, of course, have had effect in the way of divesting previously vested rights, and by its terms, out of abundance of caution merely, those rights were preserved. The plaintiff's right to complete and adequate compensation for property taken or injured, including injury to his special right in the highway as a means of enjoying the free and convenient use of his abutting property, remained without impairment."

(Emphasis added.)

The idea that punitive damages are awarded solely for the purpose of vindicating and protecting society's interests by punishing those who engage in egregious tortious conduct and deterring them and others from engaging in such conduct in the future, and the idea that only an amount necessary to accomplish these goals may be awarded, have been restated many times since *Meighan*. See, e.g., *Industrial Chem. & Fiberglass Corp. v. Chandler*, 547 So.2d 812, 837 (1988) (opinion on application for rehearing, following opinion after remand [1989]):

> "Although not imposing the stigma of crime or the unique burdens of imprisonment, punitive damages nonetheless serve to place the defendant on notice that it has engaged in conduct considered intolerable by society and also [serve] to deter others from following the defendant's example. But [when a punitive award is levied], the degree or amount must be comparable to the act deserving punishment. And though the defendant has engaged in intolerable conduct, it does not surrender its right to 'fair' punishment; in other words, 'although punitive damages need bear no particular relationship to actual damages, they, nonetheless, must not exceed an amount that will accomplish society's goals of punishment and deterrence.' *Green Oil Co. v. Hornsby*, 539 So.2d 218 (Ala. 1989), citing *Maryland Casualty Co. v.*

> *Tiffin*, 537 So.2d 469 (Ala. 1988), *City Bank of Alabama v. Eskridge*, 521 So.2d 931 (Ala. 1988), and *Roberson v. Ammons*, 477 So.2d 957 (Ala. 1985)."

Consequently, before the ratification of the 1901 Constitution, if the defendant was not shown to be guilty of the kind of egregious conduct that was contemplated by the common law as deserving of punishment, then the jury had no legal authority to award punitive damages. Furthermore, in cases involving egregious conduct, discretionary awards of punitive damages by juries were subject to post-judgment review by the courts under an abuse-of-discretion standard. Thus, the kind of discretion that juries were allowed to exercise at common law before the ratification of the 1901 Constitution was a limited discretion, which this Court has compared to the kind of "legal" discretion that is routinely exercised by courts. *Coleman v. Pepper*, 159 Ala. 310, 49 So. 310 (1909). *Black's Law Dictionary* 466-67 (6th ed. 1990), under "Discretion," defines "judicial and legal discretion," in pertinent part, as follows:

> "These terms are applied to the discretionary action of a judge or court, *and mean discretion bounded by the rules and principles of law, and not arbitrary, capricious or unrestrained.* It is not the indulgence of a judicial whim, but the exercise of judicial judgment, *based on facts and guided by law*, or the equitable decision of what is just and proper under the circumstances. *It is a legal discretion to be exercised in discerning the course prescribed by law and is not to give effect to the will of the judge, but to that of the law.* ... A liberty or privilege to decide and act in accordance with what is fair and equitable under the peculiar circumstances of the particular case, *guided by the spirit and principles of the law* ...."

(Emphasis added.)

It is clear, therefore, that before the ratification of the 1901 Constitution an individual had the right in certain cases to have a jury make the factual determination whether punishment was necessary to protect society's interests and to have the jury award punitive damages if they jury was so inclined. This right received constitutional protection

by virtue of § 11. However, it is equally clear that in performing its factfinding function, before the ratification of our present Constitution in 1901, the jury was always subject to the rule of law in exercising its discretion. The jury could award punitive damages only in those cases involving egregious tortious conduct on the part of the defendant, and any award made by the jury in such a case could not exceed an amount that would accomplish society's goals of punishment and deterrence. When the Constitution of 1901 was ratified, the right that was afforded constitutional protection by § 11 was the right of an individual to have a jury act as factfinder and to return a verdict in accordance with the rules of law applicable to the particular case. Before the ratification of the 1901 Constitution, there was no legislative restriction on the exercise of a jury's discretion in awarding punitive damages, such as the restriction imposed by § 6-11-21. In other words, when the 1901 Constitution was adopted the legislature had taken no steps to declare the maximum amount a jury could award to vindicate and protect society's interests. It was the function of the court, acting on a case-by-case basis, to declare what this amount was and to order a remittitur if necessary. Although § 11 prohibited legislative interference with an individual's common-law right to have a jury perform its historic factfinding function, § 11 did not confer upon an individual the right to have a jury perform this function in a vacuum, i.e., freed from the guidance or control of the law.

Section 6-11-21 represents a change in the law only in the sense that it declares the maximum amount that is allowable to accomplish society's goals of punishment and deterrence. Section 6-11-21 did not affect the discretionary authority that the jury had, before the ratification of the 1901 Constitution, to award punitive damages. The jury has never been allowed to award more than an amount deemed necessary by society to punish and deter. Who has the authority to determine the outer limits of punishment and deterrence? Those duly elected by a majority of Alabamians to make law, or 12 people randomly selected from driver's license records, who have survived challenges for cause, *Batson* challenges,[2/] and peremptory challenges of attorneys for particular parties in a particular civil action? I believe those duly elected, not those randomly selected, have the power to determine what is a maximum

---

[2/] *Batson v. Kentucky*, 476 U.S. 79 (1986).

amount needed to punish and deter. When viewed from this perspective, it is clear that § 6-11-21 did not change the law, at least with respect to the extent of the jury's discretion to award punitive damages.

The legislative's power to regulate punitive damages is derived from two provisions in the Alabama Constitution. "The legislative power of this state shall be vested in a legislature ...." (Art. IV, § 44). "It is of course well understood that *the only authority which has the power to make State laws is the legislature*. Section 44, Constitution." *Personnel Bd. of Mobile County v. City of Mobile*, 264 Ala. 56, 60-61, 84 So.2d 365, 369 (1955) (emphasis added). "Section 44 of the Constitution is the express constitutional provision for representative government." *Opinion of the Justices No. 263*, 379 So.2d 939, 940 (Ala. 1980). "'It [representative government] is based on the concept that democratic government functions best through a written Constitution vesting the full legislative power in representatives chosen by the people ....'" *Opinion of the Justices No. 201*, 287 Ala. 321, 323, 251 So.2d 739, 741 (1971) (quoting *Opinion of the Justices No. 36*, 232 Ala. 56, 166 So. 706 (1936)).

According to the plain wording of Art. IV, § 104(28), the legislative department of government has the power to "[r]emit[] ... penalties," if it does so by general law. Section 6-11-21 is a general law. "Penalty" includes punitive damages. "Remit" means to "give up" or "reduce." "The state had the right to remit punitory damages ...," *Meighan*, 165 Ala. at 599, 51 So. at 778, if it did so by a general law, which § 6-11-21 is.

No citizen has a *right* to recover punitive damages; therefore, there is no life, liberty, or property interest of a plaintiff involved where punitive damages are concerned. *State ex rel. Galanos v. Mapco Petroleum, Inc.*, 519 So.2d 1275, 1277 (Ala. 1987), stands for the proposition that if two provisions of the Constitution are seen to conflict and one of them is contained in Art. I, the Declaration of Rights, then the provision from the Declaration of Rights will prevail. *State ex rel. Galanos* specifically involves § 35, "Objective of Government." This has paramountcy among constitutional provisions:

> "[T]he sole and only legitimate end of government is to protect the citizen in the enjoyment of life, liberty, and

> property, and when government assumes other functions it is usurpation and oppression."

Government includes the judiciary:

> "*The powers of the government of the State of Alabama* shall be divided into three distinct departments, each of which shall be confided to a separate body of magistracy, to wit: Those which are legislative, to one; those which are executive, to another; and *those which are judicial*, to another."

Section 42, Constitution. (Emphasis added.)

Because a plaintiff has no life, liberty, or property interest in an award of punitive damages, the only legitimate end of government in connection with the issue of punitive damages is to protect a defendant's property interest in not having to pay punitive damages that would exceed government's goal of punishment and deterrence. Government, in its legislative capacity, set society's goal of punishment and deterrence by enacting § 6-11-21. Whether this was wise or needed is not for the judiciary to say, because the legislature was not prohibited by the Constitution from enacting § 6-11-21. Not only was the lislature not prohibited from enacting § 6-11-21, it was expressly empowered to do so by the Constitution (§ 104(28)). "The Legislature shall pass general laws for the cases enumerated in this section." See *Official Proceedings of the Constitutional Convention of 1901* at 1799-1800.

I note that should this Court overrule *Henderson*, then the $250,000 cap on punitive damages provided by § 6-11-21 will, in my view, be revived. See *State ex rel. Attorney General v. Paul*, 5 Stew. & P. 40, 49 (Ala. 1833), overruled on other grounds, *State ex rel. Attorney General v. Porter*, 1 Ala. 688, 701 (1840), which cites with approval the following from *Paul*: "'The statute [declared unconstitutional] is not repealed: it remains in the code of laws; and should the same, or a higher tribunal, subsequently determine it to be consistent with the constitution, it is subject to be enforced accordingly.'" See *Legal Tender Cases*, 79 U.S. (12 Wall.) 457, 533-34 (1870); *Legg's Estate v. Commissioner*, 114 F.2d 760, 764 (4th Cir. 1940); *Jarvish v. Morlet*, 86 A.2d 96, 97 (D.C. 1952); *State ex rel. Badgett v. Lee*, 156 Fla. 291, 294-95, 22 So.2d 804, 806 (1945); *Christopher v. Mungen*, 61 Fla. 513,

532-33, 55 So. 273, 280 (1911); *McCollum v. McConaughy*, 141 Iowa 172, 177, 119 N.W. 539, 541 (1909); William Michael Treanor & Gene B. Sperling, *Prospective Overruling and The Revival of "Unconstitutional" Statutes*, 93 Colum. L. Rev. 1902, 1912-13 (1993); Earl T. Crawford, *The Legislative Status of an Unconstitutional Statute*, 49 Mich. L. Rev. 645, 651-52 (1951); Mark Graham, Note, *State v. Douglas: Judicial "Revival" of an Unconstitutional Statute*, 34 La. L. Rev. 851 (1974).

Maddox, J., concurs.

SEE, Justice (concurring specially).

I write specially to reiterate what this Court noted in *Oliver v. Towns*, [Ms. No. 1970312, January 15, 1999] ____So. 2d ___, ___ n. 7 (Ala. 1999) (See, J.), concerning *Henderson v. Alabama Power Co.*, 627 So. 2d 878 (Ala. 1993):

> "Given the post-*Henderson* developments in the concept of due-process law, see, e.g., *BMW of North America, Inc. v. Gore*, 517 U.S. 559 (1966), and the forceful rationale of the dissents in *Henderson*, 627 So. 2d at 894 (Maddox, J., concurring in part; dissenting in part), and *id.* at 903 (Houston, J., dissenting), we question whether *Henderson* remains good law. See *Henderson*, 627 So.2d at 900-01 (Maddox, J., concurring in part; dissenting in part) ...."

Maddox, J., concurs.

LYONS, Justice (concurring specially).

I agree with Justice Houston's preference for deferring the question whether *Henderson v. Alabama Power Co.*, 627 So. 2d 878 (Ala. 1993), should be overruled. This Court should not make such a momentous decision in a setting where there is a debatable issue as to whether the record is adequate to support review of this issue on appeal.[3/] When we

---

[3/] Compare *Oliver v. Towns*, [Ms. 1970312, Jan. 15, 1999] ____ So. 2d ___, at ____ (Ala. 1999) (Lyons J., concurring in part and

have before us a case in which the trial court has expressly ruled that the "cap" statute (§ 6-11-21, Ala. Code 1975) can or cannot be applied, and it is squarely presented to us on appeal, then I believe that we should revisit *Henderson*.

I am unaware of any other state court of last resort that has struck down a legislative cap on punitive, as opposed to compensatory, damages on constitutional grounds. As of this writing, the only other citation I find by a state court to *Henderson v. Alabama Power Co.*, supra, appears in *Smith v. Printup*, 254 Kan. 315, 866 P.2d 985, 997 (1993), *appeal after remand*, 262 Kan. 587, 938 P.2d 1261 (1997), where the Kansas Supreme Court cited with approval the dissenting opinions of Justices Maddox and Houston. Perhaps such a case striking down caps on punitive damages, if it exists, can be called to the Court's attention if the issue whether to overrule *Henderson* should come before us.

If that question comes before us, and if *Henderson* is overruled, the parties could address the extent to which the doctrine of stare decisis applies to rectification of erroneous constructions of the Constitution.[4/] The parties could also address the proper method for implementing any decision overruling *Henderson*. Would such a ruling reinstate the cap statute? If so, several other questions could then arise. Should any such decision apply prospectively only or should it apply to pending actions? If a decision overruling *Henderson* applies to pending actions that have not been tried, should the plaintiff be allowed the opportunity to amend

---

concurring in the result in part) ("However, because [the defendant] did not ask this Court to revisit *Henderson v. Alabama Power Co.*, ... I would confine any reference to § 6-11-21 to an observation that, on remand, the trial court should consider whether the statute has a constitutionally permissible field of operation in this nonjury case.") (Citation omitted.)

[4/] *See Ex parte Dan Tucker Auto Sales, Inc.*, 718 So. 2d 33, 42 n. 10 (Ala. 1998) (Lyons J., concurring specially and quoting from Justice Black's dissenting opinion in *Gwin, White & Prince v. Henneford*, 305 U.S. 434, 454-55 (1939), in which he stated, "[T]he rule of stare decisis cannot confer powers upon the courts which the inexorable command of the Constitution says they shall not have.").

his complaint to develop exceptions to the cap? As to cases that have been tried, where the record does not support the applicability of an exception, should further proceedings be allowed that could lead to a new trial if the plaintiff develops sufficient evidence to support the applicability of an exception?

Whether this and other special writings in this case will later be viewed as "the handwriting on the wall" remains to be seen. In any event, the interesting questions suggested here must await another day.

BROWN, Justice (concurring specially).

I agree that this case presents a close question as to whether the issue regarding the constitutionality of § 6-11-21, Ala. Code 1975, was properly preserved for review, but I conclude that it was not. This Court should not revisit *Henderson v. Alabama Power Co.*, 627 So.2d 878 (Ala. 1993), unless it is convinced that the appellant properly preserved that issue by obtaining an adverse ruling from the trial court. See *Cooley v. Knapp*, 607 So.2d 146, 148 (Ala. 1992), cert. denied sub nom. *Cooley v. Brown*, 507 U.S. 992 (1993); *Alabama Power Co. v. Turner*, 575 So.2d 551, 553 (Ala.), cert. denied, 500 U.S. 953 (1991).

APPENDIX B

SUPREME COURT OF ALABAMA

OCTOBER TERM, 1998-99

1972057

GOODYEAR TIRE AND RUBBER COMPANY
AND NATHANIEL WILLIE JEFFERSON BROCK

v.

TERESA M. VINSON

1972186

TERESA M. VINSON

v.

GOODYEAR TIRE AND RUBBER COMPANY
AND NATHANIEL WILLIE JEFFERSON BROCK

APPEALS FROM JEFFERSON CIRCUIT COURT
(CV-95-157)

ORDER

RE: 1972057 *Goodyear Tire and Rubber Co. v. Vinson*
1972186 *Vinson v. Goodyear Tire and Rubber Co.*

DATE: March 4, 1999

FOR: ORAL ARGUMENT - March 12, 1999
Tuscaloosa, Alabama

In this case, the Court is being asked to overrule *Henderson v. Alabama Power Co.*, 527 So.2d 878 (Ala. 1993). What effect would our overruling *Henderson* have on Ala. Code 1975, § 6-11-21 (if the majority of this Court should vote to overrule *Henderson*)? Does the doctrine of stare decisis have any lesser force when constitutional issues are presented? The parties are invited to discuss these issues.

The parties are directed to 1) *State ex rel. Attorney General v. Paul*, 5 Stew. & P. 40 (Ala. 1833), in which the following appears: "[T]he statute [declared unconstitutional] is not repealed, it remains in the code of laws; and, should the same, or a higher tribunal, sequently, determine it to be consistent with the constitution, it is subject to being enforced accordingly." 2) Treanor & Sperling, "Prospective Overruling and The Revival of 'Unconstitutional' Statutes," 93 Columbia Law Review 1902 (1993), in which the following appears (pages 1912-13):

> "B. State Courts
>
> "Unlike the Supreme Court, several state courts have explicitly addressed the revival issue. The relevant state court cases have concerned the specific issue of whether a statute that has been held unconstitutional is revived when the invalidating decision is overturned. With one exception, they have concluded that such statutes are immediately enforceable.
>
> "The most noted instance in which the revival issue was resolved by a court involved the District of Columbia minimum wage statute pronounced unconstitutional in Adkins. After the Court reversed Adkins in West Coast Hotel, President Roosevelt asked Attorney General Homer Cummings for an opinion on the status of the District of Columbia's statute. The Attorney General responded,
>
> "The decisions are practically in accord in holding that the courts have no power to repeal or abolish a statute, and that notwithstanding a decision holding it unconstitutional a statute continues to remain on the statute books; and that if a statute be declared unconstitutional and the decision so declaring it be

subsequently overruled the statute will then be held valid from the date it became effective."

APPENDIX C

IN THE CIRCUIT COURT OF
JEFFERSON COUNTY, ALABAMA
BESSEMER DIVISION

TERESA M. VINSON,

Plaintiff,

vs.

THE GOODYEAR TIRE & RUBBER CO.,
AN OHIO CORPORATION;
NATHANIEL WILLIE JEFFERSON BROCK;
AN INDIVIDUAL, ET AL,

Defendant.

CASE NO. CV 95-157

JULY 10, 1998

ORDER

The Court heard arguments on the Motion for New Trial in the Case of Teresa M. Vinson vs. The Goodyear Tire and Rubber Co., an Ohio Corporation; and Nathaniel Willie Jefferson Brock, an individual. The court denies the Motion for New Trial and the Motion for Judgment as a matter of law are also denied. These motions pertains to both defendants.

In considering the Motion for Remittitur for both defendants, the Courts finds the following facts:

On October 21, 1994, the Plaintiff was driving on I-59/20 between the Fairfield City limits and Valley Road off-ramp. The Defendant, Nathaniel Willie Jefferson Brock was an employee of the Goodyear Tire

and Rubber Company and was driving a one and one-half ton pickup truck belonging to the corporation. His direction of travel was towards Birmingham in the same location of the Plaintiff. The parties were in parallel lanes of travel when the Defendant came over into the Plaintiff's lane and then corrected his course, shortly thereafter came over again into the Plaintiff's lane, struck her vehicle and caused her to swerve. She then careen cross the interstate and then across the median where she collided with the trailer of an eighteen wheel tractor trail truck headed in the opposite direction on I-59/20.

The Plaintiff suffered extensive injuries, serious and life threatening in nature. She was taken by Life Saver helicopter to Carraway Methodist Medical Center where she remained from October 21, 1994 through November 29, 1994 when she was transferred to Lakeshore Rehabilitation until December 17, 1994. Her medical bills to date approximated $368,000.00 of which $348,000.00 as were admitted at trial. The possibility of future surgery is imminent.

The incident which occurred on a Friday afternoon, the end of a full work week for the defendant, Brock. The Defendant testified he worked 50-55 hours per week and drove the company truck each day. The Defendant, Brock's driving record was admitted into evidence showing a total of five (5) accidents. It was further learned that in March of 1990 his driver's license was suspended by the State for accumulation of points.

The Defendant Goodyear through their Corporate representative, Mr. Milburn, told of internal corporate policies stating safety maxims as:

1. "These associates are also expected to maintain a satisfactory driving record (both on and off the job) as an indication of their driving competence."

2. "Studies have shown there is a correlation between the traffic violation conditions and the potential for future accidents and that a person's past driving history is indicative of future driving performance. In the event of a traffic accident while operating a vehicle on company business, the associate's driving record will surely be taken into account in any ensuing legal action by other individual parties."

Testimony revealed there had been no remedial driving training for the employees of Goodyear. Physical exams of Defendant, Brock, showed he was to wear glassed, but was not wearing them on the occasion of this incident.

The Court finds the imposition of punitive liability in this case is appropriate because of the showing by clear and convincing evidence that Defendants Goodyear Tire and Rubber Co. and Nathaniel Willie Jefferson Brock were guilty of wanton conduct. The evidence which was presented to the jury showed not only negligence and exercise of poor judgment, but the failure on the part of Goodyear to institute even the simplest of training to educate drivers and to insure the use of that education by their drivers through repetition and reminders of basic safety rules. Although Brock met the federal requirements applicable to motor carriers and was duly licensed by the State of Alabama to drive the Goodyear vehicle he did not observe even the simplest of safety measures. Repetition of remedial training could have prevented this accident. It is because of this that the Court finds Goodyear acted unreasonably in permitting Brock to drive without this training and that this conduct was the proximate cause of the Plaintiff's injuries. This conduct which was so easily corrected was allowed to continue, on as such was to conscious disregard for the safety of others. Even with this finding, the question remains as to what amount it takes for deterrence and retribution, the objectives of punitive damages.

The Supreme Court has provided for post-verdict review as set forth in Hammond, Green Oil, and Sec. 6-11-21 (b), Ala. Code 1975. Hammond v. City of Gadsden, 493 So.2d 1374 (Ala. 1986), Green Oil Co. v. Hornsby, 539 So.2d 218 (Ala. 1980)

1. *Degree of Reprehensibility*

The Court on many occasions has found that some wrongs are more blameworthy than others. This can be seen in those cases where the Court has found trickery and deceit other than negligence and wantonness. This particular factor can be the guidepost to be review of punitive damage award.

"The degree of reprehensibility of the Defendant's conduct should be considered. The duration of this conduct, the degree of the

Defendant's awareness of any hazard which his conduct has caused of is likely to cause, and any concealment or cover up of that hazard and the existence and frequency of similar past conduct should all be relevant in determining this decree of reprehensibility. "Ford Motor Company vs. Dee Watt Sperau and Samuel R. Foster, 708 So.2d 111 (Ala. 1995).

In applying this guidepost to Goodyear's Conduct in this case, I find that while the reprehensibility of Goodyear's conduct justifies a penalty, it does not justify the high degree of reprehensibility that a six million dollar punitive damages award would indicate.

The Court is well aware of the number of drivers that Goodyear has at its service. However, the majority of those would be subject to Federal regulations for over the road drivers. The safety programs for those other drivers leaves much to be desired. However, there were some very limiting instructions given to the drivers, but none as to the proper operation of the trucks. the potential for harm to the general public could be great, but could easily be protected by the institution of some remedial safety driving program, which the Corporate representative, Mr. Milburn, testified they had done after this tragic accident.

I conclude that Goodyear's conduct manifests only a moderate degree of reprehensibility. Here where there is a higher award of compensatory damages, it does not support this ratio of punitive damages. This ratio of 3 to 1 would meet the test that the Supreme Court has found in BMW and other cases. Based on the fact that Brock or Goodyear lacked a malicious intent in its failure to either find training or to give training and the substantial amount of compensatory damages, the Court concludes the ratio should be 1 to 1.

2. *Sanctions for Comparable Misconduct*

The attorneys for either side presented no evidence either for or against this factor and as such the Court considers it in that light most favorable to the Plaintiff.

3. *Was the Wrongful Conduct Profitable to the Defendant*

The costs to institute a remedial driving program are very limited and by for less than the six million dollars set as punitive damages. The Court does conclude that Goodyear did derive some benefits as a result of its failure to institute a driving program. But this program would have a higher implementation cost than the maintenance of the program, both relatively small compared to the punitive verdict. As such, the profit motive to Goodyear must be heavily discounted.

4. *Financial Position of the Defendant*

The Court is well aware that a Defendant's financial position is relevant to determine the propriety of an amount of punitive damages, Green Oil v. Hornsby, 539 So.2d at 223 (1989). In the Associated Financial Services Co. of Alabama vs. Barbour, 592 So.2d 191, 199 (Ala. 1991), the Court finds that for punitive damages to be effective, the amount of damages ought to be large enough to hurt. But this should be weighed with whether the Plaintiff should enjoy a windfall because they have the good fortune to have a Defendant with wealth. Here there is only a moderate degree of reprehensibility.

5. *The Cost of litigation*

Justice it has been found is not a cheap commodity and in this case the costs associated with this trial in time and money were moderate. All the costs of litigation would be more than adequately covered by a lesser punitive damages award.

6. *Criminal Sanctions*

Did the Defendant suffer any criminal sanctions for the wrongful conduct, i.e., improper lane change? No evidence was presented to this Court as to any sanctions for either lane change violation or failure to have a remedial driving program. These would be minimal, if any. This factor would not suggest a reduction of punitive damages.

7. *Other Civil Actions*

No other civil actions concerning failure to have a driving safety program were placed on the record.

8. *Economic Harm resulting From the Act and Was the Act One of Intentional Misrepresentation, Deceit or Concealment*

The Court is well aware of the costs in terms of medical expenses, $368,000 plus other potential medical expenses. The effect on her ability to work and the known problems of her condition on her future health. There was no evidence presented or any misrepresentation or deceit and as such this is entirely applicable.

The Court finds that this case is not like many of the cases ruled on by a Court such as Life Insurance Company of Georgia vs. Johnson, *Ford Motor Company vs. Sperau and Fosters* and others where fraud or intentional misrepresentation occurred allowing the Defendants to obtain substantial profits from their wrongful conduct where Alabama citizens were victims of fraud and had little recourse other than through litigation, Fraser v. Reynolds, 588 So.2d 488 (Ala. 1991). In this case, the Court cannot find any deceitful conduct, misrepresentation or profit motive to support a substantial punitive damage award even though the Defendant, Goodyear is wealthy. The conduct complained of is not of such a nature to be egregious or reprehensible, but does show a high degree of negligence and wantonness on the part of Goodyear by its failure to protect both the public and its own employees by the implementation of a very effective and cost inducive remedial driving program.

Based on all evidence, arguments, and factors of Hammond/Green Oil Analysis, the Motions for New Trial and Judgment as a matter of law are denied. The Court concludes that the punitive damages should be reduced to two million dollars. The Motion for New Trial is overruled or denied on the condition that the Plaintiff, within twenty-eight (28) days of the date of this order file in this Court a remittitur reducing the punitive damages to two million dollars. If the Plaintiff does not file such a remittitur, then the Defendants will be granted a new trial.

Done and Ordered this 10th day of July, 1998.

/s/
Dan C. King, III
Circuit Judge

APPENDIX D

SUPREME COURT OF ALABAMA

SPECIAL TERM, 1999

1972057

GOODYEAR TIRE AND RUBBER COMPANY AND NATHANIEL WILLIE JEFFERSON BROCK

v.

TERESA M. VINSON

1972186

TERESA M. VINSON

v.

GOODYEAR TIRE AND RUBBER COMPANY AND NATHANIEL WILLIE JEFFERSON BROCK

APPEALS FROM JEFFERSON CIRCUIT COURT
(CV-95-157)

ON APPLICATION FOR REHEARING

JULY 2, 1999

PER CURIAM.

APPLICATION OVERRULED.

Hooper, C.J., and Cook, See, Lyons, Brown, and Johnstone, JJ., concur.

Maddox and Houston, JJ., dissent.

LYONS, Justice (concurring).

I concur to overrule the application for rehearing. At the risk of being labeled a slave to procedural niceties, I adhere to the view that faithful adherence to the commands of procedural rules has a purifying effect upon the process by which we make often momentous substantive determinations.

The requirement that one seeking to overrule adverse precedent obtain an adverse ruling from the trial court does not require a litigant to do a "vain thing." In his dissent, Justice Houston cites several cases in which the Court said it was not necessary for a party to perform a vain or useless act. None of those cases excuses a party from the ordinary rule that a party must make a record in the trial court in order to assert error on appeal. Moreover, Justice Houston's argument overlooks the fact that these defendants had available Rule 5, Ala. R. App. P., under which, in a proper case, a trial court considering a motion could make a ruling adverse to a party, yet consistent with precedent and, at the same time, find that an interlocutory appeal "would materially advance the ultimate termination of the litigation," because "there is substantial basis for difference of opinion," given subsequent decisions. See, e.g., *Professional Ins. Corp. v. Sutherland*, 700 So. 2d 347 (Ala. 1997) (trial court relied on precedent in its holding, yet gave the statement required by Rule 5, Ala. R. App. P., for an interlocutory appeal; this Court gave permission to appeal, and on that appeal adopted a new rule of law). Furthermore, requiring a party to make a record in the trial court, even in the face of settled precedent, forces a party to seek a timely ruling so as to avoid a waiver. Requiring timely action thereby assists the appellate court in identifying the appropriate stage for applying the new rule in further proceedings after remand. Finally, it is anomalous to reverse a trial court's order on a ground the trial court was never asked to consider.

In their answer, both Goodyear and Brock asserted that the statutory damages cap was applicable to this case. However, merely reciting a

defense in an answer does not create a record that can be reviewed on appeal, because a matter stated in an answer does not require a ruling by the trial court. See *Violette v. Smith & Nephew Dyonics, Inc.*, 62 F.3d 8, 11 (1st Cir. 1995), *cert. denied*, 517 U.S. 1167 (1996) ("Merely mentioning an issue in a pleading is insufficient to carry a party's burden actually to present a claim or defense to the district court before arguing the matter on appeal."). Only when a party seeks by motion in the proceeding to apply a defense raised in an answer will that party get a ruling that can be reviewed on appeal.

The dissent relies on *Wallace v. Doege*, 484 So. 2d 404, 405 (Ala. 1986), as authority for the proposition that a limitations defense can be reviewed on appeal merely because it was stated in the answer. That case expressly refers to the trial court's refusal to hear the limitations defense when it was presented at the close of all the evidence. In *Ex parte State Dep't of Revenue*, 595 So. 2d 472 (Ala. 1991), also relied upon in the dissent, the trial court declined to address a constitutional issue. The record in the present case simply does not support a conclusion that the trial court refused to apply the cap statute. *Farm Country Homes, Inc. v. Rigsby*, 404 So. 2d 573 (Ala. 1981), the final case relied upon by the dissent in this context, speaks to the necessity that a defendant raise the limitations defense in a pleading. To infer from that case that merely raising the issue by answer is sufficient to preserve error for appeal, a point that could not have been at issue in *Rigsby*, where the pleadings made no reference at all to limitations, would require too great a leap for me.

Goodyear and Brock unquestionably moved for a remittitur. Thus, we are not here presented with an issue regarding the necessity that a party object and state grounds in support of the objection.[1/] Rule 7(b)(1), Ala. R. Civ. P., requires that a motion state the grounds on which the motion is based and state them "with particularity." How "particular" must one be when the trial court is bound by precedent? The only caselaw from this Court that I have found touching upon the necessity for an *objection* and a statement of the grounds therefor, in the context of an adverse precedent, is *Ex parte Beavers*, 598 So. 2d 1320 (Ala. 1992), where this Court, dealing with a defendant's right to claim the benefit of

---

1/ See Rule 46, Ala. R. Civ. P.

precedent in the form of an opinion of the United States Supreme Court in an unrelated case, held that the defendant was not excused from preserving error in the trial court. In *dictum*, the Court suggested that the announcement of a "new rule" in an unrelated action might excuse the defendant from the burden of objecting, citing *United States v. Scott*, 425 F.2d 55, 57-58 (9th Cir. 1970), *after remand*, 446 F.2d 509 (9th Cir. 1971). *Scott*, however, has subsequently been overruled in *United States v. Keys*, 133 F.3d 1282 (9th Cir.), *opinion amended on rehearing*, 143 F.3d 479 (9th Cir.), *second amendment*, 153 F.3d 925 (9th Cir.), *cert. denied*, ___ U.S. ___, 119 S.Ct. 211 (1998), because the creation of such an exception was deemed inconsistent with a federal rule of criminal procedure requiring an objection to a jury instruction.

The dissent refers to the defendants' raising the defense in a motion for a judgment as a matter of law and in objections to jury instructions. Because § 6-11-23 condemns any reference to the cap in the presence of the jury, at pain of mistrial, a preverdict motion for a judgment as a matter of law, made at the close of the evidence and based on the cap statute, if granted, or the court's giving an instruction that applied the cap, would have put the trial court in error for disclosing to the jury that it could not return a verdict in excess of the cap. How can we reverse the trial court's judgment on the basis of its correctly denying the motion for a judgment as a matter of law or correctly overruling objections to instructions?

Goodyear and Brock did not mention the cap statute in their motions for remittitur. We must look to the defendants' "Memorandum of Law and Submission of Authorities in Support of Defendants' Post-Judgment Motions" for grounds that relate to the cap statute. Other papers can be considered in determining grounds for a motion. *Lac Du Flambeau Bank of Lake Superior Chippewa Indians v. Wisconsin*, 957 F.2d 515, 517 (7th Cir.), *cert. denied*, 506 U.S. 829 (1992). However, the defendants' treatment of the cap in their memorandum can fairly be described as a request that the court view the statutory limit of $250,000 as directory and not mandatory. The thrust of the memorandum is that the cap may not technically be applicable, by reason of *Henderson*, yet the defendants urge that the wisdom of the Legislature in setting a limit of $250,000 is informative to the trial court as it engages in the process of arriving at an appropriate reduction in punitive damages pursuant to the guidelines established in cases from this Court, such as *Green Oil*

Co. v. Hornsby, 539 So. 2d 218 (Ala. 1989), authorizing a trial court to order a remittitur. Compare the mandatory characterization of the impact of the cap in the defenses contained in the answers of both Goodyear and Brock. Paragraphs 14 and 15 of Goodyear's answer state:

> "14. This defendant specially pleads the limitations set forth in Section 6-11-21 of the Alabama Code.
>
> "15. This defendant pleads the $250,000 cap and avers that the abolishment of the cap by the Alabama Supreme Court was unconstitutional and without effect."

Paragraph 18 and 19 of Brock's answer are identical to paragraphs 14 and 15 of Goodyear's Answer. These statements are insufficient for the purposes for which the defendants now seek to use them, because they do not insist upon the cap as a limit but rather invoke it as a mere guideline from the legislature.

I am not persuaded that the ground stated in the defendants' motions, when read in connection with their memorandum, satisfies the requirements of Rule 7(b)(1). Nor do I favor resorting to the rule of construction stated in Rule 1, Ala. R. Civ. P. -- that the rules should be construed to assure "the just ... determination of every action" -- as a basis for disregarding the appellants' noncompliance with our procedural rules.

The appellants' attempt to charge this Court with violating their right to due process by developing a novel rule of procedural default and applying it to them for the first time, and without notice. That charge has no merit. I therefore concur to overrule the application for rehearing.

JOHNSTONE, Justice (concurring).

I concur with the denial of the defendants' application for rehearing. In the application, as well as in the appeal itself, the defendants are urging us to hold the trial court in error for not applying § 6-11-21, Ala. Code 1975, to cap punitive damages at $250,000. The defendants, however, did not put the trial court in error by insisting, *post verdict* as

manifestly contemplated by § 6-11-21 and § 6-11-22, that the trial court apply the cap as such.

Section 6-11-21 reads:

> "An award of punitive damages shall not exceed $250,000, unless it is based upon one or more of the following:
>
> "(1) A pattern or practice of intentional wrongful conduct, even though the damage or injury was inflicted only on the plaintiff; or,
>
> "(2) Conduct involving actual malice other than fraud or bad faith not a part of a pattern or practice; or
>
> "(3) Libel, slander, or defamation."

Section 6-11-22 provides:

> "Argument or mention, in the presence of the jury, of the classifications or limitations established in Section 6-11-21 is not permissible and shall be ground for a mistrial."

The defendants' post-verdict brief to the trial court states, in pertinent part,

> "This [trial] Court is bound by *Henderson* [*v. Alabama Power Co.*, 627 So. 2d 878 (Ala. 1993), which held § 6-11-21 unconstitutional]. Defendants reserve the right, however, to ask the Alabama Supreme Court to overrule that decision and apply the statutory cap in this case."

Error and appeal do not work that way. The defendants' words, "*this Court is bound by Henderson*," mean the defendants did not insist that the trial court apply the cap contrary to *Henderson*. Therefore, the trial judge's decision not to apply the cap was precisely what the defendants told him the law required of him and thus was not an adverse ruling by the trial court that could be appealed as an error.

This Court cannot hold the trial court in error absent an adverse ruling constituting error. *Chesser v. Mid-South Electrics, Inc.*, 652 So. 2d 240 (Ala. 1994). Because we find no prejudicial error argued by the defendants on this issue or any other, the trial court judgment was properly affirmed and the defendants' application for rehearing is properly denied.

HOUSTON, Justice (dissenting).

In their brief on application for rehearing, Goodyear and Brock, the appellants, correctly argue that we have denied them procedural due process by requiring that they have asked the trial judge to do something that he did not have, and never would have, the power to do: overrule a decision of this Court. Such a requirement violates what has been a long-standing maxim in this state's jurisprudence, that "Alabama law does not require the performance of a vain or useless act." *Mutual Assur., Inc. v. Wilson*, 716 So.2d 1160, 1165 (Ala. 1998). See also *Ex parte Industrial Distrib. Servs. Warehouse, Inc.*, 709 So. 2d 16 (Ala. 1997); *Richards v. Henderson*, 589 So.2d 709 (Ala. 1991); *Owens v. National Sec. of Alabama, Inc.*, 454 So.2d 1387 (Ala. 1984); *Goldman v. Jameson*, 290 Ala. 160, 275 So.2d 108 (1973); *Rayborn v. Housing Auth. of Washington County*, 276 Ala. 498, 164 So.2d 494 (1964); *American Life Ins. Co. v. Powell*, 262 Ala. 560, 80 So.2d 487 (Ala. 1954); *Saenger Theatres Corp. v. McDermott*, 239 Ala. 629, 196 So. 265 (1940); *Perrine v. Southern Bitulithic Co.*, 190 Ala. 96, 66 So. 705 (1914); *Mack v. De Bardeleben Coal & Iron Co.*, 90 Ala. 396, 8 So. 150 (1890).

Because this Court has consistently rejected any requirement that someone perform a pointless ceremony, if we now surprise the appellants with such a requirement we deny them due process. Indeed, the appellants were well aware of at least two things: 1) that the trial court was bound by *Henderson* and had no authority to overrule it; and 2) that we would not, according to this Court's unwavering and unqualified stance, as evidenced above, require them to go through the senseless ritual of asking the trial judge to overrule a decision of this Court. As the appellants point out, if they had had *any* suspicion that this Court would hold as it did, then they would have taken the 30 seconds or so that would be required to walk up to the trial judge and say "Your Honor, we ask this Court to overrule *Henderson*." However, the

appellants had *no* reason to think that they had to ask that of the trial judge (there is no Alabama authority -- or authority from any other state, for that matter -- that would impose such a requirement) and they had *every* reason (based on our own holdings) to think that they did not have to perform such a vain act.

In fact, not only does our caselaw state that no pointless act will be required, but many cases cited by the appellants seem to say that raising the issue as they did in the trial court was sufficient to preserve it for appeal, even without an explicit adverse ruling. For example, in *Wallace v. Doege*, 484 So. 2d 404 (Ala. 1986), a decision with four Justices concurring and one Justice concurring in the result, this Court rejected an argument that a defendant could not raise a statute-of-limitations defense on appeal because there was no ruling by the trial court on that issue. The Court stated:

> "[T]he statute of limitations was raised as an affirmative defense in the pleadings and was presented to the trial court at the close of all the evidence, but the trial court refused to hear it at that time. *Since the statute of limitations was put into issue in the pleadings, it may be considered on appeal.*"

484 So.2d at 405. (Emphasis added.) See also *Ex parte State Dep't of Revenue*, 595 So. 2d 472, 474 (Ala. 1991) (stating that "[b]ased on our review of the record, we find that the constitutionality of § 6-5-605 was at issue below, although the trial court declined to address it"); *Farm Country Homes, Inc. v. Rigsby*, 404 So. 2d 573, 576 (Ala. 1981) (implying that if a statute-of-limitation defense is put into the pleadings, it is preserved for appeal).

With this in mind, the appellants demonstrated advocacy that can only be described as exhaustive. For example, in Goodyear's amended answer and in Brock's answer, both of which were filed less than two months after this action was filed, the following items appear:

In Goodyear's answer:

> "14. This defendant specially pleads the limitations set forth in Section 6-11-21 of the *Alabama Code*.

> "15. This defendant pleads the $250,000 cap and avers that the abolishment of the cap by the Alabama Supreme Court was unconstitutional and without effect.
>
> "16. This defendant avers that the Alabama Supreme Court cannot abolish the $250,000 cap for punitive damages established by the legislature and the attempt to abolish the cap violates the Constitutions of the United States and the State of Alabama."

In Brock's answer:

> "18. This defendant specially pleads the limitations set forth in Section 6-11-21 of the *Alabama Code*.
>
> "19. This defendant pleads the $250,000 cap and avers that the abolishment of the cap by the Alabama Supreme Court was unconstitutional and without effect.
>
> "20. This defendant avers that the Alabama Supreme Court cannot abolish the $250,000 cap for punitive damages established by the legislature and the attempt to abolish [it] violates the Due Process Clause of the Fourteenth Amendment of the United States Constitution."

The appellants raised these defenses again 1) in their motions for judgment as a matter of law made at the close of the plaintiff's case and again at the close of all the evidence; 2) in arguing their objections to the trial court's charges to the jury; and 3) in their motion for a remittitur. As the appellants ask, what more could they have done? In answering that question, we should remember Alabama Code 1975, § 6-11-22, which provides:

> "Argument or mention, in the presence of the jury, of the classification or limitations established in Section 6-11-21 is not permissible and shall be grounds for a mistrial."

Clearly, any attempt to reinstate the $250,000 limitation on punitive damages should not have been made in the presence of the jury or in an instruction to the jury.

Given § 6-11-22 and the lack of any notice of a requirement that they ask the trial court to overrule *Henderson*, I must conclude that the appellants did everything they could possibly do to preserve this issue for an appeal. That this was the appellants' understanding is made apparent from the brief filed in the trial court in support of the appellants' motion for a remittitur:

> "Finally, although it bears mention that although the $250,000.00 statutory cap on punitive damages provided in [Ala. Code 1975, § 6-11-21,] was held unconstitutional by a divided court in *Henderson v. Alabama Power Co.*, 627 So.2d 878 (Ala. 1993), as impairing the traditional function of the jury, that does not render irrelevant the legislature's determination that in this type of case, $250,000 is the maximum reasonable amount. *See, Sperau v. Ford Motor Co.*, 674 So.2d 24, 44 (Ala. 1995) (Houston, J., dissenting) ('This Court, in its exercise of supervisory appellate jurisdiction over jury verdicts, is bound by the Fourteenth Amendment and Article VI (the Supremacy Clause) of the United States Constitution to conduct a "meaningful" review of jury verdicts awarding punitive damages. This Court simply cannot fulfill this constitutionally mandated responsibility without recognizing that the legislature, exercising its policy-making power, has determined that $250,000 is the maximum reasonable amount of punitive damages that should be awarded in fraud cases like this one.').[6]
>
> [6] This court is bound by *Henderson*. Defendants reserve the right, however, to ask the Alabama Supreme Court to overrule that decision and apply the statutory cap in this case."

In other words, knowing that they had done all they knew to do in the trial court (with the understanding that only the Alabama Supreme Court, not the trial court, could overrule *Henderson*), the appellants did the last thing available to try to have the punitive-damages award reduced -- they used the $250,000 cap as evidence of a reasonable standard for the trial judge to consider when deciding the issue of remittitur. The trial judge refused to reduce the punitive-damages award to $250,000.

However, our summary affirmance and the special writings addressed to that affirmance suggest that the appellants should have asked the trial court to overrule *Henderson*. Such a requirement is found nowhere in our caselaw and is directly at odds with a fact of which the parties were on notice: that we will never require a party to perform a vain or useless act. This requirement also runs afoul of the purpose of the rule that only issues called to the trial court's attention can be heard on appeal; that purpose is to allow the trial judge the first opportunity to correct any mistake. See *Sea Calm Shipping Co., S.A. v. Cooks*, 565 So. 2d 212, 216 (Ala. 1990); *Moody v. State ex rel. Payne*, 295 Ala. 299, 306, 329 So. 2d 73, 78 (Ala. 1976).

In this case, there could be no error for the trial judge to correct, because there was never a question as to whether the trial judge could overrule a Supreme Court decision. Knowing that there was no error concerning the *Henderson* decision that the trial court could correct, the appellants put the trial court on notice that if the court refused to reduce the punitive damages to $250,000 then the appellants would seek to have *Henderson* overrule by the only court that could overrule it -- the Alabama Supreme Court.

The affirmance in this case and today's action denying rehearing run contrary to the United States Supreme Court's understanding of procedural due process. A good example of that Court's understanding is found in *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449 (1958). The *NAACP* case was summarized quite well in another relevant procedural-due-process case, *Reich v. Collins*, 513 U.S. 106 (1994):

> "In many ways, then, this case [*Reich*] bears a remarkable resemblance to *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449 (1958) (Harlan, J.). There, an Alabama trial court held the National Association for the Advancement of Colored People in contempt for failing to comply with a discovery order to produce its membership lists, and the Alabama Supreme Court denied review of the constitutionality of the contempt judgment on the grounds that the organization failed earlier to pursue a mandamus action to quash the underlying discovery order. The Court found that the Alabama high court's refusal to review the contempt judgment was in error. *Prior Alabama law, the Court said, showed 'unambiguous[ly]'*

> *that judicial review of contempt judgments had consistently been available, the existence of mandamus notwithstanding. Id.*, at 456. *For good measure, the Court also looked at prior Alabama law on mandamus and found nothing 'suggest[ing] that mandamus is the exclusive remedy' in this situation. Id.*, at 457 (emphasis [on the word 'exclusive'] in original). Justice Harlan thus concluded: '*Novelty in procedural requirements cannot be permitted to thwart review in this Court applied for by those who, in justified reliance upon prior decisions, seek vindication in state courts of their federal constitutional rights.*' *Id.*, at 457-458, citing *Brinkerhoff-Faris Trust & Sav. Co. v. Hill*, 281 U.S. 673 (1930) (due process violated when state court denied injunction against collection of unlawful taxes on the basis of taxpayer's failure to pursue administrative remedies, where State's prior 'settled' law made clear that no such administrative remedies existed); see generally Meltzer, State Court Forfeitures of Federal Rights, 99 Harv. L. Rev. 1128, 1137-1139 (1986)."

513 U.S. at 112-13. (Emphasis added, except as indicated.)

Cases like those mentioned above make it clear that a court cannot, consistent with the notion of procedural due process, deny one the right to be heard, based on a procedural requirement that could not and should not have been foreseen. To do so would, as the appellants point out, turn the right to be heard into "a sham or a pretense." *Palko v. Connecticut*, 302 U.S. 319, 327 (1937).

The appellants got an adverse ruling on the only motion they could legitimately file under Alabama law regarding the reduction of the punitive-damages award to $250,000. Our failure to reach this issue based on this record denies the appellants procedural due process; therefore, I would grant the rehearing.

Maddox, J., concurs.